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Utah Transit Authority v. Workforce Appeals Board Department of Workforce Services : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

UTAH TRANSIT AUTHORITY, Petitioner, vs. WORKFORCE APPEALS BOARD, DEPARTMENT OF WORKFORCE SERVICES and DAVID S. HOLLY, Respondents.	)	Appeal No. 20020860CA Priority No. 7

REPLY BRIEF OF PETITIONER UTAH TRANSIT AUTHORITY

Responding to Brief of Respondent David S. Holly

APPEAL FROM A FINAL DECISION OF THE WORKFORCE APPEALS BOARD OF THE UTAH DEPARTMENT OF WORKFORCE SERVICES

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ARGUMENT

I. UTA'S RESPONSE TO THE CLAIMANT'S POINT I.

A. The Claimant's Criticism of the Board's Finding of Knowledge Is at Odds with the Record and His Own Argument that the Board's Findings of Fact are Supported by the Record.

The Claimant's suggestion that the knowledge element of the just cause test has not been met is incongruent with the Board's findings, the record before this Court, and the Claimant's own acknowledgment that the Board's findings of fact are supported by the record. (Brief of Respondent David S. Holly ("Cl. Br.") at 4-5.) In the opening paragraph of his Point I, the Claimant argues that "[t]he Judge's (and Board's) Findings of Fact are Supported by the Record as a Whole". (Cl. Br. at 4.) Oddly, in the very next paragraph, he in essence contends that the knowledge element is not supported by the record.[1] (Cl. Br. at 5.) In particular, the Claimant asserts that he was not "on notice as to the seriousness of his alleged comments" because he allegedly did not receive a copy of a civil rights policy and because he denied the May, 2001, incident. *Id.* Because the Board already found that the Claimant had knowledge of the seriousness of using the "N" word and other racially derogatory remarks in the workplace, the Claimant's present assertion

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[1] The Claimant's discussion regarding the administrative law judge's ("ALJ's") decisionmaking on credibility of witnesses also cuts against the Claimant. (Cl. Br. at 7.) In that discussion, the Claimant states that "[t]he Judge was in the best position to see and hear all the witnesses testify". Next, the Claimant reminds the Court that the Claimant "categorically denied making any and all pejorative remarks". *Id.* Notably, the ALJ did not believe the Claimant's denials with regard to the May, 2001, and November, 2001, incidents. Instead, the ALJ found that the Claimant made racially derogatory remarks during those incidents despite the Claimant's "categorical[]" denials.

is wholly inconsistent with the Board's findings and his own opening statement that the Board's findings are supported by the record.

The Claimant's selective disturbance of the Board's factual finding on the knowledge element is also inconsistent with the record. As is more fully explained in UTA's Reply to the Board, the Claimant indisputably knew that the use of the "N" word and other racially insensitive comments in the workplace, is improper. (Reply Brief of Petitioner Utah Transit Authority Responding to Brief of Respondent Workforce Appeals Board ("UTA Reply to Bd.") at 16-17.) Not only did the Claimant admit that the use of such language was wrong, but the weight of evidence reveals that the Claimant knew of, and received orientation on, policies against such language. Furthermore, the use of racially derogatory terms in the workplace defies universal standards of conduct. (UTA Reply to Bd. at 17.) Because the knowledge element is so plainly anchored in the record and the Board's findings, the Claimant's present attempt to shift responsibility for his misconduct to another person or entity by denying knowledge of the impropriety of such misconduct, is groundless.

B. The Claimant Implicitly Acknowledges that the Parts Counter Conversation Could Have Been Overheard.

The Claimant admits to the "possib[ility] that another UTA employee could have approached the parts counter" during the November, 2001, conversation between the Claimant and Dennis Husted (the "Parts Counter Conversation"). UTA has appealed the Board's factual finding that the November, 2001, conversation was "private" based in part on the location and openness of the parts counter. (Brief of Petitioner Utah Transit

Authority ("UTA Op. Br.") at 11-13.) A conversation between co-workers at a maintenance shop parts counter is not "private". As now acknowledged by the Claimant, "[i]t is possible" that other employees could have approached the counter during the Parts Counter Conversation. It logically follows that other employees could have overheard that Conversation. The general openness of workplace conversations like the Parts Counter Conversation belies the Board's depiction of the November, 2001, conversation as "private". Even so, the use of racial epithets in a workplace conversation contributes to a hostile work environment even if the conversation does not directly involve a person of the offended racial group. (UTA Op. Br. at 26-30.)

C. The Claimant's Focus on What Mr. Dickerson Heard Does Not Detract from the Claimant's Culpability for What the Claimant Said.

UTA did not argue in its opening brief that Derando Dickerson heard the Claimant use a racial epithet in the Parts Counter Conversation. Rather, UTA maintains that regardless of whether Mr. Dickerson overheard the epithet, the Claimant is culpable under the Department of Workforce Services' ("Department's") just cause test. Nonetheless, in its Point I the Claimant focuses on whether Mr. Dickerson overheard the Claimant's use of racially derogatory remarks. (Cl. Br. at 6.) The Claimant's attention to what Mr. Dickerson heard cannot distract from what the Claimant said. As argued in UTA's opening brief and its Reply to the Board, the Claimant's use of the "N" word in November, 2001, contributed to a hostile work environment even if Mr. Dickerson did not hear the slur first-hand. (UTA Op. Br. at 26-30.) Courts have established that the use of racial slurs, even out of the presence of a racial minority, fosters a hostile work

environment. *E.g.,* Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846, 862 (Cal. 1999). Accordingly, the Claimant's assertions that there is "virtually no credible evidence" that Mr. Dickerson overheard the May, 2001, November, 2001, or January, 2002, comments, are inconsequential to the Claimant's culpability. The Claimant used racially offensive remarks that contribute to a hostile work environment. As a result, UTA's rightful interest in avoiding the risk of a Title VII claim would have been jeopardized if it had retained the Claimant.

II. UTA'S RESPONSE TO THE CLAIMANT'S POINT II.

A. Nearly All of the Claimant's Point II Is Premised on the Flawed Assumption that Culpability Hinges on Actual or Imminent Liability.

The lion's share of the Claimant's Point II is a reiteration of the Board's proposition that the Claimant's culpability is contingent upon an actual, or "high potential" for, a Title VII claim. In its brief, the Board started from the mistaken assumption that because there must be more than one racial slur to sustain a Title VII action under the Tenth Circuit analysis, a person who uses one racial slur in the workplace is not culpable under Rule 994-405-202 of the Department's Workforce Information and Payment Services Rules (hereinafter, the "Rule") . Likewise, the Claimant opens its Point II by making that same assumption. In particular, the Claimant asserts that "[t]here is no evidence that any litigation was ever threatened or that any litigation ever developed". (Cl. Br. at 9, 16 (Claimant stating that "[i]n the instant case, there was no harm - present or future").) The Claimant apparently assumes that, absent an actual filing of a Title VII action against UTA, or a "high potential for legal

exposure", the Claimant is not culpable under the Rule. (Cl. Br. at 12.) In the balance of Point II, the Claimant indirectly states that same assumption in two other ways.

First, the Claimant contends that because UTA would not be found liable for the Claimant's actions, the Claimant should not be found culpable under the Rule. (Cl. Br. at 9.) The Claimant goes so far as to enumerate various elements of a Title VII action, and speculates on the likelihood of Derando Dickerson prevailing on an Equal Employment Opportunity Commission ("EEOC") charge or lawsuit against UTA. (Cl. Br. at 9-10.) By asking this Court to walk through the elements of a Title VII claim, and speculating on whether a Title VII claim is imminent or proven, the Claimant falls back on on the assumption that the Claimant's culpability turns on the existence or "high potential" for a Title VII claim.

Second, the Claimant restates that assumption when he argues that UTA had to prove that it had "no alternative than to immediately fire" the Claimant.[2] (Cl. Br. at 13.) The Claimant suggests that UTA could have avoided Title VII liability by taking "prompt and remedial action" apart from discharging the Claimant. (Cl. Br. at 14-15 ("If UTA had taken corrective action against Mr. Holly short of a discharge and if Mr. Dickerson had filed an EEO complaint or civil action, UTA would, of course, have been able to argue that it responded to any complaints which Mr. Dickerson may have made in an

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[2] The Claimant's related remark that UTA skipped progressive discipline steps echoes a comment of the Board, and is responded to in full in UTA's Reply to the Board. (UTA Reply to Bd. at 15.) In brief, UTA's zero-tolerance policies against harassment and racial slurs expressly allow for termination for a violation of one of those policies. Therefore, UTA was not required to follow any "progressive discipline" steps when the Claimant violated those policies.

immediate and decisive manner").) Based on that suggestion, the Claimant would apparently have UTA and other employers wait for a hostile work environment to arise, respond quickly by taking some action against the harassing employee, and trust that a jury will concur that it took "prompt and remedial action" after it had actual or constructive knowledge of the offensive conduct. By taking that approach, the Claimant sets the bar for culpability at an unrealistic and unintended level. Here again, the Claimant assumes that an employer must wait for a cognizable claim to materialize or hover before it may discharge an employee to protect its rightful interest in avoiding the claim.

Each of the Claimant's above-stated assertions springs from the same flawed assumption that the culpability element requires a lawsuit to be imminent or filed to establish that an employer's rightful interest in avoiding litigation is jeopardized. As UTA has more fully briefed in its opening brief and in its Reply Brief to the Board, that assumption requires a misapplication of the Rule and a misinterpretation of Title VII. In the spirit of efficiency, UTA will not repeat in full the manner of that misapplication and misinterpretation here, but incorporates its earlier arguments. (*E.g.,* UTA Op. Br. at 13-22; UTA Reply to Bd. at 3-9.) By way of summary, the plain language of the Rule, and Utah courts in interpreting the Department's rules, contemplate that an employer must show that it bears a risk of future harm if it continues the employment relationship. For instance, by requiring an employer to show that its rightful interest would be "jeopardize[d]", as opposed to "harmed", the Department plainly requires only a showing of a risk of litigation, rather than actual or imminent litigation. (UTA Reply to Bd. at

3-5.) Thus, contrary to the Claimant's proposal that employers wait for a hostile work environment to develop before responding with some "prompt and remedial action", the Rule intends that UTA may end the Claimant's employment based on a risk of a hostile work environment materializing if the Claimant is retained.[3]

Furthermore, the use of the "N" word in the workplace jeopardizes an employer's rightful interest in avoiding Title VII litigation because even one use of the "N" word in the workplace indisputably contributes to a hostile work environment. Although the Tenth Circuit may require more than one use of the "N" word to substantiate a hostile work environment claim, no one can predict with any certainty the precise number of racial epithets that will generate a hostile work environment. Undoubtedly, that number will vary according to the facts and circumstances of each case. As a result, the only sure

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[3] The Claimant's assumption that Title VII liability must be realized or imminent is further contradicted by the Rule. The first sentence of the culpability test requires that the employer show that "*continuing the employment relationship* would jeopardize the employer's rightful interest". Utah Code Adm. P. R994-405-202(1) (emphasis added). By linking the risk to the employer's rightful interest to the phrase "continuing the employment relationship", the Department patently recognized that culpability is established when retaining the employee threatens future liability of the employer based on a subsequent action of, or circumstances involving, the employee. *Accord* Kehl v. Bd. of Review, 700 P.2d 1129, 1134 (Utah 1985) (holding that "single violation of a safety rule may be sufficient to show that the potential harm to the employer's interests warranted discharge"). Consequently, the Claimant misstates the law when he suggests that this Court take a snapshot of the facts as they are now and measure the level of exposure of UTA to a Title VII claim. Instead, this Court should examine the Claimant's current misconduct *and* the risk of *future* misconduct if UTA "continu[es] the employment relationship". As previously argued, UTA would carry a risk that a hostile work environment would develop if the Claimant had been retained. (UTA Reply to Bd. at 7-9.) By discharging the Claimant, UTA took the only reliable step to ensure that it would not have to endure the liability, defense costs, and federal scrutiny of a Title VII claim.

method available to UTA and other employers to protect against the evolution of a hostile work environment is to sever an employment relationship with an employee who uses a single racial slur in the workplace. Absent that severance, UTA sends a message that such slurs are tolerated, and the racially intolerant conduct may continue in the same employee or through other employees.[4] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (EEOC may pursue a Title VII claim against an employer that fails to remedy harassment in a manner that "takes into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct"). Contrary to the Claimant's belief, there is a clear potential for Title VII liability when an employer retains an employee who uses a racial epithet in the workplace. Hence, UTA's zero-tolerance approach to racial slurs is not a reaction to overblown fears as suggested by the Claimant, but a well thought out means of protecting UTA's interest in averting hostile work environment claims.

In short, the Claimant's and the Board's assumption that UTA must be subject to a "high potential" for a Title VII claim, or an actual claim, does not comport with the Rule nor court holdings. Nearly all of pages 8 through 16 of the Claimant's Brief rely upon that unsound assumption and are, therefore, unpersuasive.

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[4] The Claimant's contention that UTA had "many, many options" overlooks the threat of a hostile work environment that ensues if employer's fail to take a zero-tolerance approach to the use of racial slurs in the workplace. (Cl. Br. at 14.) That contention also disregards the Claimant's previous use of racially derogatory remarks in May, 2001. When the Claimant engaged in racially insensitive conduct again in November, 2001, he revealed a stubbornness or disregard for the impropriety of such conduct in the workplace. To adequately protect its rightful interest in avoiding Title VII litigation, UTA exercised the only sure option of discharging the Claimant.

B. The Claimant's Use of Racially Intolerant Remarks in May, 2001, Quashes His Suggestion that His Use of the "N" Word in November, 2001, Was an "Isolated Incident".

The remaining two paragraphs of the Claimant's Point II erroneously suggest that the Claimant's use of the "N" word during the Parts Counter Conversation amounted to an "isolated incident of poor judgment". (Cl. Br. at 16, ¶ 2.) Because this suggestion was previously raised by the Board in its brief, UTA incorporates, without reiterating here in total, its response as set forth in its Reply Brief to the Board. (UTA Reply to Board at 12-14.) Like the Board, the Claimant ignores his use of racially derogatory remarks in May, 2001, and fails to offer any explanation for the similarity between that incident and the Claimant's use of the "N" word in the Parts Counter Conversation. In both situations, the Claimant made racially offensive remarks. Clearly then, the Claimant's use of the "N" word was not "isolated" at all, but an evenn more severe recurrence.

III. UTA'S RESPONSE TO THE CLAIMANT'S CONCLUSION.

A. UTA's Policies Against Racial Slurs Are Aimed at Ridding the Workplace of Conduct that Subjects Employers to Title VII Claims.

The Claimant wishes this Court to determine that UTA merely sought to further its own interest in enforcing a "civility code" when it discharged the Claimant. The Claimant seemingly proposes that UTA's policies against harassment and racial slurs (hereinafter collectively referred to as the "Policies") are simply "civility codes". In doing so, the Claimant downplays the severity of racial epithets, likening them to just name-calling. (Cl. Br. at 17, ¶ 3.) However, it is well-settled that the use of a racial slur

such as the "N" word is among the most egregious of terms, and contributes to a hostile work environment. Thus, UTA's Policies are not designed to instill simple courtesies. While civility is attained through those Policies, they are plainly intended to rid the workplace of racial slurs and harassment that may underlie an actionable Title VII claim. (*See, e.g.*, R. 24 (Exh. 17) (UTA's Harassment policy stating that "[i]t is the policy of UTA that . . . such conduct is against the law and will not be tolerated from any UTA employee".) In short, by steadfastly enforcing Policies against racial slurs and harassment, UTA avoids the risk of Title VII liability that it would otherwise shoulder by continuing an employment relationship with a violator of one of those Policies.

B. The Claimant Should Bear the "Social Cost" of His Own Misconduct.

The Claimant infers that UTA should absorb the "social cost" of enforcing its Policies against the Claimant. That inference fails for two main reasons. First, the Rule provides a framework for determining whether that cost will fall on the employer. In this case, the Claimant's conduct was so serious that continuing his employment would have jeopardized UTA's rightful interest in avoiding a Title VII claim.

Second, shifting the "social cost" of the Claimant's unemployment to UTA undermines broader social aims. For instance, Congress and federal courts have already determined that racial slurs are inappropriate in the workplace, and that employers who allow slurs to be used in the workplace are at risk of a hostile work environment claim. By requiring UTA to pay the Claimant any measure of unemployment benefits, this Court would essentially penalize UTA for taking seriously the objectives of Title VII. *See, e.g.*, Ellison, 924 F.2d at 876 (" . . . Title VII's protection of employees from sex

discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance"). Additionally, shifting the "social cost" away from the Claimant contradicts the Department's own goals. The Department has by rule determined that a victim of harassment in the workplace will receive benefits. Utah Code Adm. P. R994-405-102(10), (11). Surely, the Department did not intend to saddle an employer with the "social cost" of unemployment compensation benefits for both the victim of harassment and the harassing employee who is terminated for the harassing conduct.

At the end of the day, the Claimant used an abhorrent racial epithet in the workplace contrary to established workplace norms and an express UTA policy. A "social cost" has already been born by the persons who were exposed to that conduct or learned of it afterwards. The Claimant should bear the balance of the cost of his own misconduct.

C. The Department Has Found Culpable a Claimant Who Violated UTA's Policies Against Racial Slurs by Using the "N" Word in the Workplace.

Neither the Claimant nor the Board has distinguished the Clipper matter from the present facts. As mentioned in UTA's opening brief, since issuing the Holly decision, the Department has denied benefits to another former UTA employee who engaged in misconduct that is comparable to the facts before this Court. Robert Clipper was terminated by UTA after UTA determined that Mr. Clipper used the "N" word in the workplace. (UTA Op. Br. at Exh. C.) There, Mr. Clipper used the "N" word out of the presence of an African-American. Following a hearing before an administrative law

judge ("ALJ") for the Department, the ALJ found Mr. Clipper culpable within the meaning of the Department's just cause test. The ALJ stated that "the claimant violated a well-known policy and exposed the employer to potential liability for civil rights violations and fostering a hostile work environment". *Id.* Thus, the Department has previously ruled that a single violation of UTA's policy against racial slurs sufficiently jeopardizes UTA's rightful interest in avoiding Title VII liability. While that decision is not precedential here, it shows that the Department has construed its own Rule to find culpability with a claimant who utters a single racial slur in the workplace.

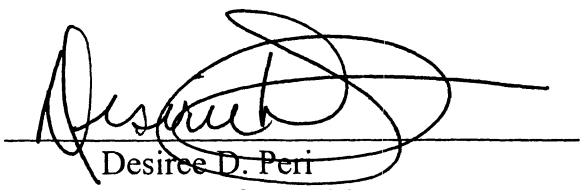
The Department's decision in the Clipper matter dilutes the Claimant's argument that this Court "should not adopt a rule that any employee fired for alleged racial harassment . . . is automatically denied benefits because the employer may have an unwarranted and exaggerated fear of potential liability, however remote that potential might be". (Cl. Br. at 19.) Clearly, even the Department acknowledges that a single racial slur creates sufficient liability for the employer if the offending employee is retained.

At bottom, an employer is at risk of Title VII liability if it retains an employee who uses a racially derogatory remark in the workplace. The only meaningful way to protect against that risk is to end the employment relationship. Under the Rule, the culpability element is met because there is a risk of Title VII litigation if the employer keeps the offending employee in the workplace. The Rule does not require the employer to prove that a lawsuit will or may be filed based on the single use of a racial epithet, in order to show culpability.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in UTA's opening brief and UTA's Reply Brief in answer to the Board's response, UTA asks this Court to reverse the Board's decision granting benefits to the Claimant.

DATED this 19th day of May, 2003.



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CERTIFICATE OF MAILING

I hereby certify that on May 19, 2003, I caused two true and correct copies of the foregoing **REPLY BRIEF OF PETITIONER UTAH TRANSIT AUTHORITY** Responding to Brief of Respondent David S. Holly, to be mailed, postage pre-paid, to each of the following:

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